SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1653

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

against

NORTHWEST AIRLINES, INC.,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OCTOBER TERM, 1975

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AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

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against

NORTHWEST AIRLINES, INC.,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Air Line Pilots Association, International ("ALPA") respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on February 3, 1976, rehearing of which was denied on February 27, 1976.

Opinions Below

The opinion of Arbitrator Nicholas A. Zumas for the Northwest Airlines, Inc. Pilots' System Board of Adjustment is set out in the Appendix to this petition, pp. 1a-6a. The Memorandum Opinion of the United States District Court for the District of Columbia, Hon. Thomas A. Flannery, is reported at 385 F. Supp. 634 and set out at App. 7a-18a. The Judgment of the District Court is re-

ported at 385 F. Supp. 640 and also appears at App. 19a-20a. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Bazelon, C. J., Justice Clark and Robinson, C. J.) reversing the judgment of the District Court, has not yet been officially reported, but is unofficially reported at 91 LRRM 2304 and 78 CCH LC ¶ 11, 240, and set out at App. 21a-26a. The unreported order of the Court of Appeals, dated February 27, 1976, denying ALPA's petition for rehearing, is reproduced at App. 27a. The unreported order of the Court of Appeals, dated February 27, 1976, denying ALPA's suggestion for rehearing *in banc*, is reproduced at App. 28a.

Jurisdiction

The decision of the Court of Appeals reversing the opinion and judgment of the District Court was entered on February 3, 1976. The orders of the Court of Appeals denying the petition for rehearing and suggestion for rehearing *in banc* of petitioner Air Line Pilots Association, International were entered on February 27, 1976. This Court has jurisdiction to review the Court of Appeals decision under 45 U.S.C. §§ 153 (p) and (q) and 204, and 28 U.S.C. § 1254(1). Jurisdiction in the District Court was predicated upon the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and on 28 U.S.C. §§ 1331, 1337, 2201 and 2202.

Question Presented

Does the new standard of review of labor arbitrations created by the Court of Appeals' decision, in conflict with other decisions of Courts of Appeals, holding that an arbitrator's decision should be set aside by reason of an alleged mistake of fact which the Court characterized as

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a "dispositive fact", violate fundamental principles of the national labor policy enunciated by this Court which have established: (1) that labor arbitration awards are to be treated as final and binding; (2) that federal courts are not to review the merits of arbitration awards or to substitute their judgment for those of arbitrators; (3) that federal courts are not to set aside arbitration awards for errors of fact or law; (4) that federal courts cannot inquire into the thought processes employed by arbitrators in reaching their decisions.

Statutes Involved

The pertinent provisions of the Railway Labor Act, as amended (the "Act"), 45 U.S.C. § 151, *et seq.*, are set out at App. 29a-32a.

Statement of the Case

a. Background

This petition seeks review of a Court of Appeals decision which would undermine the finality of labor arbitration awards which the Supreme Court has established as a fundamental tenet of Federal labor law. The effect of the Court of Appeals decision is to create a new standard for review of arbitration awards which will generate endless judicial appellate review of labor arbitration awards. As a result of the Court of Appeals' decision, a federal court faced with an action seeking to overturn an arbitration award will now be required to review in detail, and to assess, the issues before the arbitrator, the evidence presented with respect to those issues, and the reasoning adopted by the arbitrator, a role clearly at odds with controlling Supreme Court decisions and other decisions of

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Courts of Appeals and which can only serve to delay and confuse the resolution of labor-management disputes.

b. Parties

Petitioner Air Line Pilots Association, International ("ALPA") is the collective bargaining representative under the Railway Labor Act for pilots on almost all U.S. certified air carriers, including Respondent Northwest Airlines, Inc. ("Northwest").

c. Arbitration Proceeding

The arbitration involved only a question of seniority rights. The underlying dispute concerned Northwest's selection and use of certain pilots, out of seniority order, as instructor pilots during the 1970 strike of the Brotherhood of Railway Clerks, a union representing certain Northwest employees. A grievance filed by ALPA was processed through the Northwest Pilots' System Board of Adjustment ("System Board" or "Board"), established by the ALPA-Northwest collective bargaining agreement pursuant to requirement of the Railway Labor Act, 45 U.S.C. § 204. (App. 7a-8a). Under the pilot contract, System Board awards are final and binding. (App. 8a). The basic issue was "whether there was an obligation on the part of the company to select its pilot instructors from the roster of pilots on active payroll status". (App. 3a).

A hearing was held before a System Board consisting of five members: a professional labor arbitrator, Nicholas Zumas, serving as Neutral Board member, and two pilot and two management members. (App. 9a). Northwest and ALPA were represented by counsel, presented oral and written evidence, and filed memoranda. (App. 1a, 9a). After the hearing, an executive session was held at which the five Board members discussed the case (App. 9a),

following which the Northwest Board members, "bothered about the tone of our discussion" (Jt. App. 161)*, requested and were granted a second executive session for further discussion of the matter. (App. 1a, 9a). Northwest's motion to reopen the proceedings to produce still further testimony was denied (App. 9a), the Neutral having determined the parties had been provided an adequate opportunity to air their positions. (App. 12a).

d. Arbitration Award

After the executive sessions, the Neutral issued a decision and award which sustained ALPA's position on the grievance, and concluded that:

> "On the basis of the record, therefore, the Company is directed to compensate such appropriate senior pilots on a one-for-one basis during the period in question. The Company is further directed to restore such benefits as may have been lost during such period." (App. 6a).

The two ALPA Board members signed the Award providing the necessary majority to make the award final and binding on the parties. (App. 6a, 8a, 10a).

e. District Court Proceedings

Northwest refused to comply with the award and brought an action to set aside the award. ALPA counterclaimed for enforcement of the award. After substantial pretrial discovery, both parties moved for summary judgment. The District Court granted ALPA's motion, and entered judgment enforcing the award. (App. 19a).

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* "Jt. App." refers to the Joint Appendix filed with the Court of Appeals.

Reading through the "catchwords" employed by Northwest as grounds for setting aside an arbitration award, *Crigger* v. *Allied Chemical Corp.*, 500 F.2d 1218, 1219 (4th Cir. 1974), and relying upon decisions of this Court, the District Court recognized that it was not its role to review the correctness of the Board's decision "under the guise of determining whether or not the Board complied with the requirements" of the Railway Labor Act. (App. 17a). The Court found no basis for sustaining any of Northwest's claims, including its assertion that the award must be set aside for resting upon an erroneous factual basis. (App. 13a-17a).

f. Court of Appeals Proceedings

On appeal by Northwest, the Court of Appeals reversed. While acknowledging the "established policy of settling labor disputes through arbitration" militated against "opening up the merits of arbitration decisions to judicial review" (App. 24a), the Court nonetheless reviewed the award, and on the basis of an artificial distinction innovated by it, concluded that the award rested *not* on an erroneous determination of a question of fact by the arbitrator, but on the removal of a "dispositive issue of fact" from the System Board's jurisdiction by virtue of the Board's inappropriate reliance on an alleged "stipulation" concerning a factual issue. (App. 24a). On that basis, the Court held that the parties did not get what they bargained for—"a board decision resolving their arguments and evidence one way or the other, as opposed to relying on a non-existent stipulation of dispositive fact". (App. 26a).

While misapprehending the significance of pilot acknowledgement of no "stipulation" by the Company on a specific factual issue, the Court ignored the fact that the arbitrator reached his "conclusion" on what the Court of Appeals

termed the "dispositive issue" after "considerable discussion on this point" and not on the basis of any "stipulation" (Jt. App. 47) .

Despite the fact that the Neutral did decide the issue before him, did reach a result which was plausible under the agreement, and did not exceed his jurisdiction, the Court of Appeals directed the District Court to set the award aside because, in its view, the arbitrator had not "resolved" an arbitrable issue. (App. 26a). The Court denied ALPA's subsequent petition for rehearing. (App. 27a).

REASONS FOR GRANTING THE WRIT

The Court of Appeals' Decision Which Creates a New Standard for Review of Labor Arbitration Awards Necessitating Endless Judicial Intervention in the Arbitration Process Is In Conflict With Applicable Decisions of This Court and Other Decisions of Courts of Appeals Establishing Fundamental Principles of Federal Labor Law

In a series of three decisions in 1960, commonly referred to as the *Steelworkers* trilogy, this Court announced the basic principles guiding the relationship between the labor arbitration and judicial processes. *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). These decisions, as the District Court in this case observed, "enunciated a clear policy of encouraging arbitral resolution of labor disputes by limiting judicial review of arbitration awards". (App. 10a). Recognizing that prompt resolution of such dis-

putes could be better accomplished through extra-judicial resolution by individuals with expertise in such matters, this Court instructed that courts were to refrain from reviewing the correctness of labor arbitration awards:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes would be undermined if courts had the final say on the merits of the awards." *United Steelworkers* v. *Enterprise Wheel, supra,* 363 U.S. at 596.

This remains the guiding principle to which Courts are expected to adhere. See, e.g., *Gunther* v. *San Diego & Arizona Eastern Ry. Co.*, 382 U.S. 257, 263-264 (1965); *Hines* v. *Anchor Motor Freight, Inc.*, —— U.S. ——, 96 S. Ct. 1048, 1056 (1976). Also see, *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana Railroad Co.*, 353 U.S. 30 (1957).

The Court of Appeals' decision disregards this principle and establishes a new standard for review which has the foreseeable consequence of generating massive judicial involvement in direct conflict with this Court's announced policy of judicial restraint in such matters.

The Court of Appeals' decision rests solely on its determination that the arbitration board somehow failed to confine itself to matters within its jurisdiction in resolving the dispute before it. The Court's determination is without any decisional support, and is contrary to this Court's prior pronouncements.

One of the very limited grounds under the Railway Labor Act for setting aside a System Board award is, as

the Court of Appeals noted, "for failure of the order to conform, or confine itself, to matters within the scope of the [board's] jurisdiction." 45 U.S.C. § 153, First (q) (App. 24a). While the Court of Appeals recognized that the concern under such a provision has been with instances "when an arbitration board ventures *outside* the scope of the authority conferred on it by the collective bargaining agreement" (App. 25a), it nevertheless proceeded to extend the concept to the situation "when an arbitration panel mistakenly assumes that certain issues are not before it" (App. 25a), and as a result does not "decide" all the issues within its jurisdiction.

The attempt by the Court of Appeals to rationalize its obvious departure from traditional doctrine misapprehends and is at odds with the teaching of this Court's *Steelworkers* trilogy. *Enterprise Wheel, supra,* established the principle that, since the arbitrator derives his jurisdictional authority from the collective bargaining agreement, he may not exceed the scope of the agreement. Thus, in reviewing an award, the Court must determine that the arbitrator "stayed within the areas marked out for his consideration", *id.*, at 598. Once the Court determines that these tests are satisfied, judicial inquiry ends.

The extension by the Court of Appeals of the doctrine to a situation where the arbitrator is alleged to have decided *less* than what was submitted to him properly—a "reverse-*Enterprise*" situation—is entirely unprecedented and destructive of the entire framework for private, non-judicial resolution of labor-management disputes which this Court established as fundamental and crucial in its *Steelworkers* trilogy. Those decisions were premised on two basic and complementary concepts: (1) labor-management disputes will be resolved through an arbitral process which "substitutes a regime of peaceful settlement for the

older regime of industrial conflict", *Warrior and Gulf, supra*, 363 U.S. at 585; and (2) that policy can only prove successful if the arbitrator's function under that regime is not usurped by the Courts and his decision is recognized as final and binding. *American Manufacturing, supra*, 363 U.S. at 569; *Enterprise Wheel, supra*, 363 U.S. at 598-599.* Without continued recognition and application of the second of these concepts, the first also falls.

To satisfy the Court of Appeals' new standard, a court would necessarily have to determine how the arbitrator arrived at his decision, what weight he gave the evidence before him, and what testimony he credited. Such an inquiry would, as the District Court observed, be similar to probing the thought processes of a judge or jury—an exercise which may not be condoned. (App. 17a). See, *Gramling* v. *Food Machinery & Chemical Corp.*, 151 F. Supp. 853 (W.D.S.C. 1957). It would also run directly counter to this Court's admonition that the courts are to refrain from passing on the "reasoning" employed by an arbitrator in reaching his award, *Enterprise Wheel, supra*, 363 U.S. at 598, lest arbitrators be encouraged to "play it safe by writing no supporting opinions", *id.*,—a consequence which this Court considered permissible, but undesirable. *Id.*

Reliance by the Court of Appeals upon this Court's decision in *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368 (1974) is misplaced (App. 25a). In *Gateway*, the Supreme Court reemphasized the "presumption of arbitrability" of labor-management disputes, and the requirement that any "doubts" regarding arbitrability should be resolved in favor of arbitration. *Id.*, 414 U.S. at 377-380 (citing *United Steelworkers of America* v. *Warrior &*

* The same concepts apply under the Railway Labor Act. *Int'l. Association of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963); *Union Pacific Railroad Co.* v. *L. I. Price*, 360 U.S. 601 (1959).

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Gulf Co., supra, 363 U.S. at 582-583). Thus, even if the Court of Appeals' "reverse-*Enterprise*" theory of judicial review were proper, a court should not readily assume that an arbitrator has improperly excluded an issue from consideration; indeed, any ambiguity should be resolved in favor of the arbitrator's proper exercise of his function as long as it was within his arbitral authority. *United Steelworkers* v. *Enterprise Wheel, supra,* 363 U.S. at 598. In the case herein, neither the arbitrator nor the parties expressed in any way that the jurisdiction of the arbitrator had been narrowed, or that a "dispositive issue of fact" had been removed from the arbitrator's jurisdiction. The Court of Appeals, however, reached the conclusion that this had occurred by a novel and strained reading of the arbitrator's award, and by mistakenly giving the pilot members' acknowledgement of a "non-stipulation" an overly broad and unfounded import. Even if the arbitrator's conclusion as to what he found had been "agreed" was inartistically or ambiguously phrased, it cannot be said with "positive assurance" (c.f., *Warrior & Gulf, supra,* 363 U.S. at 582-583), that his decision reflected a declination of jurisdiction, and not a determination on the merits. As further noted in *Warrior & Gulf*:

> "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail . . ." *Id.,* at 584-585.

If the actions of the parties to an agreement are held to so rigorous a standard in order to justify judicial intervention in the arbitral process, it is submitted that analysis of an arbitrator's conduct, thought mechanisms, and decisional processes should *a fortiori* result in refusal to set aside an arbitration award.

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In this case, the arbitrator stated that, as to the questioned holding, there was "considerable discussion on this point . . .", and that it was his feeling that it was ". . . . entirely proper to consider and weigh statements and concessions made by . . . [Employer board members] during Executive Session in reaching a conclusion." (Jt. App. 47). It is submitted that the arbitrator made it abundantly clear that his "conclusion" (not his removal of an issue from arbitration) was based upon "considerable discussion", "statements" and "concessions", (not upon a "nonexistent stipulation"); for the Court of Appeals to conclude otherwise reflected a gross misapprehension of the facts and the law, and a determination to trespass into areas to which it is forbidden access by prior decisions of this Court.

This Court has made it clear that it is not a court's function to determine whether the "conclusion" the arbitrator has reached is correct, or whether the court would have resolved the grievance differently:

> "[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *United Steelworkers* v. *Enterprise Wheel, supra,* 363 U.S. at 599.

Also see, *United Steelworkers* v. *American Manufacturing Co., supra,* 363 U.S. at 568. Numerous Courts of Appeals decisions have recognized that errors of fact or law by the arbitrator do not provide a basis for setting aside an arbitration award, and a court cannot substitute its judgment

for that of the arbitrator. See, e.g., *Air Line Pilots Association, Int'l.* v. *Capitol International Airways, Inc.*, 343 F. Supp. 923, 926 (M.D. Tenn. 1971), *aff'd*, 458 F.2d 1349 (6th Cir. 1972); *Dallas Typographical Union No. 173* v. *A. H. Belo Corp.*, 372 F.2d 577, 581-582 (5th Cir. 1967); *Amalgamated Butcher Workmen Local U. No. 641* v. *Capitol Packing Co.*, 413 F.2d 668, 672-673 (10th Cir. 1969); *San Maritime Compania de Navegacion, S. A.* v. *Saguenay Terminals Ltd.*, 293 F.2d 796, 800 (9th Cir. 1961); *Ludwig Honold Mfg. Co.* v. *Fletcher*, 405 F.2d 1123, 1132 (3rd Cir. 1969); *Orion Shipping & Trading Co.* v. *Eastern States Petroleum Corp. of Panama*, 312 F.2d 299, 300 (2nd Cir. 1963), *cert. denied*, 373 U.S. 949 (1963); *Edwards* v. *St. Louis-San Francisco Railroad Co.*, 361 F.2d 946, 952 (7th Cir. 1966); *Washington-Baltimore Newspaper Guild, Local 35* v. *The Washington Post Co.*, 442 F.2d 1234, 1239 (D.C. Cir. 1971); *Saxis Steamship Co.* v. *Multifacs International Traders, Inc.*, 375 F.2d 577, 581-582 (2d Cir. 1967). Also see the recent decision of the Court of Appeals for the Ninth Circuit in *Aloha Motors* v. *Int'l. Longshoremen's and Warehousemen's Union, Local 142*, —— F.2d ——, 91 LRRM 2751, 2752 (9th Cir. 1976) (reversing decision of District Court which had vacated arbitration award).

Significantly, the Court of Appeals did *not* say that an arbitrator could not rely on concessions or statements by Company representatives as a basis for ruling against the Company. Rather, it is only because the arbitrator was, in the Court's view, in error in his understanding and evaluation of those "concessions" and "statements" that the award must be set aside. Thus, it is only by exploring the very areas which this Court has declared are closed to judicial scrutiny that the Court of Appeals was able to reach the result it did.

The policy of judicial deference to arbitration awards often "takes judicial self-discipline of an exacting order", *Gulf States Telephone Co.* v. *Local 1692, Int'l Brotherhood of Electrical Workers,* 416 F.2d 198, 202, n. 11 (5th Cir. 1969), but it is nevertheless essential because, "The arbiter was chosen to be the Judge. That Judge has spoken. There it ends." *Safeway Stores* v. *American Bakery & Confectionary Workers Int'l Union, Local 111,* 390 F.2d 79, 84 (5th Cir. 1968). The decision of the Court of Appeals herein unfortunately succumbed to the temptation of correcting what it viewed as an error in the arbitration award, and in so doing, failed to exercise that "self-discipline" mandated by prior pronouncements of this Court.

Conclusion

The Court of Appeals' decision reversing the District Court and setting aside a final and binding System Board award on the basis of a new standard for review presents a clear departure from prior pronouncements of this Court and other Courts of Appeals which had sharply limited judicial involvement in review of labor arbitration awards. If allowed to stand it will undermine the federal labor policy to the serious detriment of both mnagement and labor since each of these contending interests will be free to plague the other with endless review of arbitration decisions. It will also add considerably to the already overburdened caseload of the federal courts. For the reasons stated, it is respectfully requested that a writ of certiorari issue to review the Court of Appeals' decision, and that, upon review, the Supreme Court order the enforcement of the System Board Award.

Respectfully submitted,

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APPENDIX

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Opinion of the Arbitration Board

OUT OF SENIORITY GRIEVANCE

BEFORE THE NORTHWEST AIRLINES, INC.
SYSTEM BOARD OF ADJUSTMENT

—o—

In the Matter of

NORTHWEST AIRLINES, INC.

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

—o—

BACKGROUND

Pursuant to the provisions of the Agreement between the parties, the above-entitled matter came before the System Board of Adjustment comprised of Messrs. A. E. Floan and S. G. Lee of the Company, Messrs. G. A. Stone and H. Muto of the Association, and Mr. N. H. Zumas, Neutral Referee. Hearing was held in Minneapolis on June 17, 1971, at which oral testimony was presented and transcribed with exhibits submitted by both sides.

Written briefs were submitted by the Association in October 1971 and by the Company in November 1971. On May 24, 1972, an Executive Session was held in Minneapolis. A further Executive Session was held in Minneapolis on June 27, 1972, at which time the Company filed a Motion to Reopen the hearings for the purpose of adducing further testimony relative to the issue of past practice. The motion was opposed by the Association. On July 6, 1972, the Neutral advised the parties that Company's Motion to Reopen was denied.

Opinion of the Arbitration Board

STATEMENT OF FACTS

In July 1970 the Brotherhood of Railway and Airline Clerks (BRAC) called a strike against the Company. As a consequence, the Company furloughed all but approximately 300 of its 1,800 pilots. During the course of the BRAC strike many of the pilots retained by the Company were not the most senior on the system seniority list. This, according to the Company, was necessary because many very senior pilots were not qualified to fly in either the "equipment or category demanded by the strike-altered schedules" and therefore "immediate training was required and was provided in order that line flying be kept in seniority order as much as possible."

Thus, junior pilots were retained to fly as second officers on the 707 and 727 aircraft, and junior pilot "instructors" were retained for the purpose of training senior pilots during this period.

With respect to those pilots retained to *fly* as second officers on the 707 and 727 aircraft, the Company agreed to pay, on a "one-for-one" basis,[1] pilots laid off but more senior to those pilots retained.

This dispute centers around those junior pilots retained for the purpose of serving as instructor pilots, and does not involve those junior pilots retained to fly as second officers on the 707 and 727 aircraft.

Subsequent to the resolution of the junior *flying* pilots retained out of seniority, there began a series of meetings between officials of the Company and the Association to consider, among other things, the "one-for-one" question as it affected instructor pilots.

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[1] Payment on a "one-for-one" basis meant that the senior furloughed pilot would be made whole for the junior retained pilots' duty, including pay and fringe benefits.

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Opinion of the Arbitration Board

The testimony adduced at the hearing as to understandings, if any, reached during these meetings is in sharp conflict. Suffice it to say that the Association assumed that the Company agreed to apply the "one-for-one" formula to instructor pilots; and that several months after these meetings, the Company informed the Association "that there would be no agreement relative to the people in the flight instructor status, check airmen and so forth."

QUESTION AT ISSUE

The basic issue in this dispute is whether there was an obligation on the part of the Company to select its pilot instructors from the roster of pilots on active payroll status.

CONTENTION OF THE PARTIES

Briefly summarized, the Associaton contends:

1. While there is no requirement on the part of the Company (conceded by the Association) to follow strict seniority in the selection of instructor pilots, the Company does have an obligation to make such selection from the roster of those pilots actively employed.

2. The past practice of the Company has been to make its selection from the ranks of actively employed pilots, and such past practice has been specifically set forth by the Company's Director of Flight Training to the Association's Chairman of its Master Executive Council by letter dated June 19, 1969.

3. During the discussions in July 1970 and in the ensuing months the Association was led to believe that

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Company officials had accepted the proposal to apply the "one-for-one" formula for instructor pilots, and the Company is estopped from subsequently changing its position because the Association agreed not to go on strike on the basis of that understanding.

4. If the Company were allowed to select its instructor pilots from whatever source it wished, such action would destroy the seniority rights of the pilots under the Agreement between the parties.[2]

The Company's position, summarized:

1. There is nothing in the Agreement, past practice, or the actions of the parties requiring the Company to select its instructor pilots from the active pilot seniority list.

2. The fact that the Company agreed (by the letter of June 19, 1969) to select instructors from among pilots shown on the seniority list, did not mean that the Company had agreed to furlough in seniority order or to rehire from among senior pilots in the event of furloughs.

3. The letter of June 19, 1969, was merely a commitment on the part of the Company not to "hire off the street" as long as there were pilots on the Association seniority list qualified to be instructors.

4. Company pilot instructors, by reason of their peculiar duties and responsibilities, are a separate craft or class of employees within the meaning of the Railway Labor Act.

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[2] Section 21(c) of the Agreement states:

"Relative position on the seniority list shall govern all pilots in case of promotion and demotion, their retention in case of reduction in force, their assignment or reassignment due to expansion or reduction in schedules, their reemployment after release due to reduction in force, and their choice of vacancies. This Section shall apply except as otherwise stipulated in this Agreement."

Opinion of the Arbitration Board

DISCUSSION

As indicated earlier, there is conflicting testimony between the parties as to any "understanding" evolving out of the July 1970 discussions. Moreover, the silence on the part of the Company, under the circumstances, was insufficient as a basis for creating any kind of an estopped situation that was binding on the Company.

The provisions of the Agreement between the parties are silent as to "instructor pilots," despite the fact that Section 21(c) might arguably include instructor pilots by its reference to and inclusion of "all pilots." However, this in and of itself is insufficient.

The position of the Association is, however, supported by the June 19, 1969 letter from the Company's Director of Flight Training to the Association's Chairman of the Master Executive Council reading as follows:

> "As you are aware, we have always chosen our Check and Instructor Pilots from among the pilots shown on the pilot seniority list. You are assured that during the term of the new agreement so long as such pilots who we consider to have the qualifications for such positions make themselves available for such positions and perform their duties with the same high degree of efficiency and integrity as has been the experience in the past, we have no intention of changing our past practice."

It is agreed that the reference to "pilot seniority list" in the letter does not include furloughed pilots, but is limited to those pilots on the active roster.

Opinion of the Arbitration Board

Under the terms of the Company's commitment, it is clear that unless it was shown that the pilots on the active roster were not qualified there was an obligation on the part of the Company to make its selection from that active roster.

Failure on the part of the Company to meet its burden of showing lack of qualification requires the grievance of the Association to be sustained. On the basis of the record, therefore, the Company is directed to compensate such appropriate senior pilots on a "one-for-one" basis during the period in question. The Company is further directed to restore such benefits as may have been lost during such period.

/s/ Nicholas H. Zumas
Nicholas H. Zumas, Neutral Member

/s/ George A. Stone (Affirm) (~~Dissent~~)
Association Member

/s/ Herman Muto (Affirm) (~~Dissent~~)
Association Member

(Affirm-Dissent)
Company Member

(Affirm-Dissent)
Company Member

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Memorandum Opinion of District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 829-73

—o—

NORTHWEST AIRLINES, INC.,

Plaintiff,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Defendant.

—o—

This suit concerns the validity of an arbitration award made pursuant to section 204 of the Railway Labor Act, 45 U.S.C. § 184 (1970), involving a seniority grievance following a strike. The parties are now before the court on cross-motions for summary judgment. A brief recitation of the facts of the case is useful in arriving at a clear understanding of the issues.

Plaintiff Northwest Airlines, Inc. (NWA) is a common carrier engaged in interstate commerce and is subject to the provisions of the Railway Labor Act, 45 U.S.C. § 151, *et seq.* (1970). Defendant Air Line Pilots Association, International (ALPA) is a labor organization recognized for collective bargaining purposes as representative of pilots in the employ of NWA. Section 204 of the Railway Labor Act, 45 U.S.C. § 184 (1970), establishes the procedure by which contractual interpretation and application are to be determined for airlines and their employees. *See International Association of Machinists, AFL-CIO* v. *Central Airlines, Inc.*, 372 U.S. 682, 685-86 (1963). Pursuant to the

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mandate of § 204 Northwest and ALPA have, by agreement, established the NWA Pilot's System Board of Adjustment for the purpose of adjusting and deciding disputes which may arise under the terms of the Pilots Agreement. The Board consists of five members, two appointed by the company, two by the Association, and a neutral member, selected by agreement or appointed by the National Mediation Board for each dispute. The neutral member is Chairman of the Board and presides at meetings and hearings, guiding the parties in the presentation of their evidence. A majority vote of the Board is final, binding and conclusive.

In accordance with the Agreement, Northwest and ALPA submitted to the Board a dispute concerning the airline's selection and use of pilot instructors during a strike by a separate craft group in 1970. The basic issue was whether there was an obligation on the part of the company to select its instructors only from those pilots on active payroll status, or whether it might hire both active and furloughed pilots. ALPA contended that the company had an obligation, based on past practice and the apparent acquiescence of the company, to hire only active pilots. Northwest contested this assertion, arguing that nothing in the Agreement, past practice, or actions of the parties prohibited the airline from selecting its instructors either from active or furloughed pilots. A primary bone of contention was a letter of June 19, 1969 from Northwest's Director of Flight Training to ALPA's Chairman of the Master Executive Council which indicated that Northwest had selected and would continue to select instructor pilots from those on the "pilot seniority list." The company claims that this was merely an agreement not to "hire off-the-street" while ALPA viewed it as support for its contention that only active pilots would be hired.

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Memorandum Opinion of District Court

A hearing on this grievance was held on June 17, 1971. George A. Stone and Herman P. Muto were the ALPA representatives on the Board; Albert E. Floan and Stewart G. Lee were the Northwest representatives; and Nicholas H. Zumas, an attorney, was the neutral member. After the hearing Board members received copies of the hearing transcript and exhibits, and post-hearing memoranda were submitted by counsel for ALPA and Northwest. The Board was convened twice in executive session to review the matter and at the second session the Northwest members moved to reopen the hearings to take further evidence regarding past practice in selecting pilot instructors. That motion was later denied in writing by the neutral. On October 10, 1972 Zumas sent a signed original of his award to Floan, who was secretary of the Board, for distribution to the other members and for their signatures. That award contained a finding that parties agreed that reference to a pilot seniority list in the letter of June 19, 1969 was limited to those pilots on the active roster. The parties, in their pleadings, acknowledge that no such agreement was made.

The award concluded that the letter of June 19 indicated commitment by the company to hire instructor pilots only from those pilots on active status unless they were not qualified. Thus the neutral sustained ALPA's position on the grievance and Northwest was directed to compensate senior pilots on a "one-for-one" basis[1] if they were passed over for employment. Since the neutral also concluded that the evidence presented concerning two other matters, the provisions of the agreement and the understanding between the parties, was insufficient to show that the company

[1] Normally the airline must select the most senior qualified pilot. For each junior pilot selected the company must pay the senior pilot who would otherwise have been selected.

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had hired out-of-seniority, the award appears to be based on an erroneous finding of fact.

There was a space of several months between the time the arbitrator issued his award (Oct. 1972) and the time the second ALPA representative signed the award and made it final (Feb. 1973). Northwest claims that during this time ALPA Board members knew of the erroneous finding but did not inform the neutral or do anything to correct it. Floan, a Northwest representative, called this matter to the attention of Zumas, discussed it with ALPA representatives and attempted to enlist the aid of the Northwest and ALPA legal departments. He also apparently withheld distribution of the award to the ALPA Board members. There was considerable discussion and communication, not completely without acrimony, as Northwest attempted to have the erroneous finding corrected. ALPA was agreeable to some change in the language of the award, but not to the extent that the result would be altered. ALPA Board members eventually obtained and signed copies of the award and it was forwarded to the National Mediation Board for filing. Northwest has refused to comply with the order and has brought this action seeking to set aside the award.

Normally courts are most reluctant to intervene in labor arbitration matters. In 1960, in a series of cases labeled the *Steelworkers Trilogy*,[2] the Supreme Court enunciated a clear policy of encouraging arbitral resolution of labor disputes by limiting judicial review of arbitration awards.

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[2] *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

The Supreme Court stated:

> The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

See Union Employers Division of Printing Industry of Washington, D. C. v. *Columbia Typographical Union*, 353 F. Supp. 1348, 1349 (D.D.C. 1973), *aff'd*, 492 F.2d 669 (D.C. Cir. 1974). This rationale has been incorporated in the Railway Labor Act itself which requires the district court to accept the System Adjustment Board's determination of the merits of the grievance. *See Thorgeirsson* v. *Trans World Airlines*, 288 F. Supp. 71, 75-76 (S.D.N.Y. 1968); 45 U.S.C. § 153 (1970). The Act provides in essence that the district court shall have jurisdiction to review an award of a Board only for failure of the Board to comply with the statute, for failure of the order to conform or confine itself to the jurisdiction of the Board, or for fraud or corruption by a member making the order. 45 U.S.C. § 153 (q) (1970). While that section deals with railroad boards, plaintiff concedes that courts look to it in examining awards under the air transport regulations. *See International Association of Machinists, AFL-CIO* v. *Central Airlines, Inc., supra; Rossi* v. *Trans World Airlines*, 350 F. Supp. 1263, 1269 (C.D. Cal. 1972). Northwest contends that the court may review the present award since Northwest was denied due process, and since the actions of the ALPA Board members taken subsequent to Zumas' issuance of the award were tantamount to fraud. Plaintiff also contends that the award can be

reviewed since it is wholly baseless and without reason.

Plaintiff has failed to show any action on the part of the neutral which would constitute denial of due process or of a fair and impartial hearing. A full hearing was conducted and two executive sessions were held. Although Zumas refused to allow reopening for further evidence that in no way constituted an abuse of discretion since it was within his authority to determine at what point the evidence submitted was sufficient. *See Catz American Co.* v. *Pearl Grange Fruit Exchange, Inc.*, 292 F. Supp. 549, 553 (S.D.N.Y. 1968). The court can discern no evidence of partiality on the part of the neutral which could be construed as a denial of due process by the Board. *See Rosen* v. *Eastern Airlines, Inc.*, 400 F.2d 462 (5th Cir. 1968), *cert. denied*, 394 U.S. 959 (1969).

Northwest also contends that the ALPA Board members had a duty to notify the neutral that his finding was in error and that by signing an award containing an erroneous finding the members perpetrated fraud upon Northwest. Although plaintiff uses the term fraud in a general sense it is a specific tort, requiring proof of false representation, in reference to a material fact, made with knowledge of its falsity and with intent to deceive. In addition, action must be taken in reliance upon the representation. *U.S.* v. *Kiefer*, 228 F.2d 448 (D.C. Cir.), *cert. denied*, 350 U.S. 933 (1956); *Sankin* v. *5410 Connecticut Avenue Corp.*, 281 F. Supp. 524, 545 (D.D.C. 1968), *aff'd sub nom. Benn* v. *Sankin*, 410 F.2d 1060 (1969) *cert. denied*, 396 U.S. 1041 (1970). Only by the most strained construction of these elements could a claim of fraud be made out in the present case. Admittedly fraud may arise from an omission as well as an explicit misrepresentation, *see Gibbons* v. *Brandt*, 170 F.2d 383, 391 (7th Cir. 1948), *cert. denied*, 336 U.S. 910 (1949), but plaintiff has the burden of proving an arbitrator's misconduct. *See*

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Catz American Co. v. *Pearl Grange Fruit Exchange, Inc., supra* at 551-52. Northwest has not met the burden of proving that the ALPA Board Members were under an obligation to inform the neutral of an erroneous finding. In the general arbitral situation in which each party appoints representatives to the Board and the neutral is selected by them or by a disinterested third-party, the representatives of the parties cannot be expected to play a wholly impartial part. "They are partisans once removed from the actual controversy." *Stef Shipping Co.* v. *Norris Grain Co.*, 209 F. Supp. 249, 253 (S.D.N.Y. 1962).[3] It is commonly accepted that the party-designated arbitrators are not and cannot be neutral in the sense that the independent arbitrator or a judge is. Moreover, members should not be required to agree with all of the findings of the arbitrator prior to affixing their signature to the award, and even though the ALPA members concede the substantial factual error in the award they nonetheless agreed with its outcome. *See* letter of February 15, 1973 from H. P. Muto and George Stone to James F. Conway. It, therefore, is apparent that plaintiff seeks to have this court review the findings of the arbitrator on the merits.

The Supreme Court has emphasized the final nature of System Board awards on several occasions. *See Gunther*

[3] This view draws support from the decision of the Second Circuit in *D'Elia* v. *New York, New Haven & Hartford Railroad Co.*, 338 F.2d 701 (2d Cir. 1964), *cert. denied*, 380 U.S. 978 (1965). Under the Railway Labor Act complaints are heard by the National Railroad Adjustment Board, composed of company and union representatives. Only in a case of deadlock is a neutral referee appointed. 45 U.S.C. § 153 (1970). The court held that under the Act the plaintiff was entitled to a completely impartial hearing only when the case reached the referee designated to sit with the Board. As long as the final hearing officer was impartial the requirements of due process were satisfied. 338 F.2d at 702. *See McDonald* v. *Penn Central Transportation Co.*, 337 F. Supp. 803, 806 (D. Mass. 1972).

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v. *San Diego & Arizona Eastern Railway Co.*, 382 U.S. 257, 263-64 (1965); *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana Railroad Co.*, 353 U.S. 30 (1957). The Court of Appeals for the District of Columbia Circuit, in a frequently cited opinion also spoke to this issue stating:

> "we do not believe Congress intended that [adjustment board awards] should be circumvented by free resort to judicial review or determination de novo of the merits of the controversy."

Washington Terminal Co. v. *Boswell*, 124 F.2d 235, 240 (1941), *aff'd by an equally divided court*, 319 U.S. 732 (1943). *See Bower* v. *Eastern Airlines*, 214 F.2d 623, 625-26 (3rd Cir.), *cert. denied*, 348 U.S. 871 (1954). Therefore, a claim by a party that the award was based on erroneous conclusions of law or fact or on insufficient supporting facts will not be upheld. *Edwards* v. *St. Louis-San Francisco Railroad Co.*, 361 F.2d 946, 952 (7th Cir. 1966); *Orion Shipping & Trading Co.* v. *Eastern States Petroleum Corp. of Panama*, 312 F.2d 299, 300 (2d Cir.), *cert. denied* 373 U.S. 949 (1963). This is so regardless of the degree to which the arbitrator's views on the facts and the law might be open to question. *U.S. for Use and Benefit of Chicago Bridge & Iron Co.* v. *Ets-Hokin Corp.*, 284 F. Supp. 471, 476 (N.D. Cal. 1966), *aff'd*, 397 F.2d 935 (9th Cir. 1968). Indeed one court has stated frankly that "errors of judgment on the part of arbitrators are an arbitration risk." *Commercial Solvents Corp.* v. *Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359, 362 (S.D.N.Y. 1957).

As the neutral arbitrator of the System Adjustment Board, Zumas directed the hearings and prepared his award, interpretating the facts and the law. As indicated above, this court's review of his award is accordingly limited. *See*

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Airline Pilots Ass'n, International v. *Capitol International Airways, Inc.*, 343 F. Supp. 923, 926 (M.D. Tenn. 1971), *aff'd*, 458 F.2d 1349 (6th Cir. 1972). The general prohibition on review of the merits of a decision, reinforced by the language of § 153 (q) would appear to preclude any review whatsoever of the merits of an award. However, in the arbitration context the provision that an award may be reviewed if the arbitrator has exceeded his jurisdiction has been construed to encompass awards which are "without foundation in reason or fact." *See Brotherhood of Railroad Trainmen* v. *Central of Georgia Railway Co.*, 415 F.2d 403, 411-12 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008 (1970). The court, therefore, consistent with the statute, might set aside an award where the Board's interpretation is wholly baseless and without reason. *See Keay* v. *Eastern Airlines, Inc.*, 440 F.2d 667, 668 (1st Cir. 1971); *McDonald* v. *Penn Central Transportation Co., supra*, at 806. It is exactly this action which the plaintiff seeks.

The standard laid out above is a stringent one and it does not mean simply that if the award is supported by insufficient facts it may be set aside. As the Court of Appeals for the Fifth Circuit pointed out in *Brotherhood of Railroad Trainmen* v. *Central of Georgia Railway Co., supra* the requirement that the result of arbitration have a foundation in fact means that the award must, in some logical way, be derived from the wording or purpose of the contract. 415 F.2d at 412. If there is no rational way to explain the remedy handed down by the arbitrator as a logical means of furthering the aims of the contract then the award is without foundation in reason or fact and its exceeds the arbitrator's jurisdiction. In *United Steelworkers of America* v. *Enterprise Wheel & Car Corp., supra*, the court noted that while the arbitrator was bound by the collective bargaining contract he could look to many sources of guidance

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in determining his award and unless his words manifested an infidelity to that obligation, a court must enforce the award. 363 U.S. at 597.

The court can find no such blatant disregard on the part of the neutral for the contract or for his duty, and is of the opinion that the arbitrator's award of out-of-seniority pay was clearly contemplated by the contract and designed to further its aims. It was indeed the remedy specifically sought by plaintiff. Therefore the court does not find that the arbitrator has exceeded his jurisdiction or that the court may review the substance of his award.

This view is reinforced by the nature of the evidence which the court would be required to consider. Plaintiff's primary proof would be the testimony of the neutral arbitrator himself and the testimony of the other members of the System Board. *See* Hearing Transcript at 21-24, 32, 43-44. A situation analogous to this was considered by the court in *Gramling* v. *Food Machinery and Chemical Corp.*, 151 F. Supp. 853 (W.D.S.C. 1957). The court noted there that the testimony of an arbitrator tending to impeach the award is incompetent and should be rejected.

> "Therefore, the general rule is that the testimony of an arbitrator is not admissible to impeach his own findings, and where the arbitrators recite in the award itself that they have disposed of the matters submitted to them for arbitration as was proper under the provisions of the agreement for submission, the parol testimony of one, or more, or all, of the arbitrators will not be received to impeach their award and its recital." 151 F. Supp. at 861.

The court in *Gramling* refused to consider the affidavits of two of the arbitrators tendered by defendant, refused to require the arbitrators to appear for the purpose of

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testifying in regard to their deliberations, and confirmed the award. There is merit to the observation of the court in *Gramling* that the "deliberations of an arbitration board are as much a part of the judicial process as the deliberations of a jury and should be as zealously protected." 151 F. Supp. at 860. It is perhaps more accurate to describe the arbitrator as a judge, *see Safeway Stores* v. *American Bakery and Confectionary Workers International Union*, 390 F.2d 79, 84 (5th Cir. 1968), and therefore it is even less appropriate to attempt to probe his decisional processes. Indeed, the neutral himself held this view and stated at his deposition:

> "Being in a quasi-judicial capacity, I don't think it is possible for anyone to inquire as to my state of mind and to the discussions which were free and open and presumed to have been in strictest confidence to be spread out on the table.
>
> It's as though one inquires of a federal judge what notes he had that precipitated his conclusion. I think the award speaks for itself." Zumas deposition tr. 48-49.
>
> • • •
>
> "I am unwilling unless a court orders me to do so to divulge anything that is reflected in those notes." Zumas deposition tr. 51-52.

In light of the above the court will not review the correctness of the Board's decision under the guise of determining whether or not the Board complied with the requirements of § 153. *See McDonald* v. *Penn Central Transportation Co.*, 337 F. Supp. 803, 805 (D. Mass. 1972).

As a final matter the defendant, as prevailing party, seeks to recover its attorney's fees, however, such fees are

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recoverable only in exceptional circumstances. *See Air Line Pilots Ass'n. International* v. *Northwest Airlines, Inc.*, 415 F.2d 493 (8th Cir. 1969), *cert. denied*, 397 U.S. 924 (1970). No evidence of exceptional circumstances appearing, the court is of the opinion that justice would be served best in this particular case by denying defendant's request.

The parties having demonstrated no genuine issue of material fact in dispute, the court will, therefore, grant summary judgment for defendant Air Line Pilots Association, International. An appropriate Judgment accompanies this Memorandum Opinion.

Filed November 21, 1974

JAMES F. DAVEY,
Clerk

Thomas A. Flannery
United States District Judge

Judgment of the District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 829-73

NORTHWEST AIRLINES, INC.,

Plaintiff,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Defendant.

This matter came before the court on cross-motions for summary judgment. It appearing that there exists no genuine issue of material fact, and it appearing that defendant is entitled to judgment as a matter of law, and in accordance with the Memorandum Opinion issued with this Judgment, it is this 21st day of November, 1974,

ORDERED that the motion of defendant Air Lines Pilots Association, International for summary judgment as it pertains to enforcing the Award of the Northwest Airlines Pilots' System Board of Adjustment in the "out-of-seniority grievance" be, and the same hereby is, granted; and it is further

ORDERED that plaintiff's motion for summary judgment on the same issue be, and the same hereby is, denied; and it is further

Judgment of the District Court

ORDERED that plaintiff Northwest Airlines, Inc., its officers, employees and agents immediately comply with the requirements imposed upon the company by the above-mentioned Award; and it is further

ORDERED that plaintiff Northwest Airlines, Inc. pay interest at the rate of six percent per annum on all monies owing since the date of the System Board Award until the date upon which payment is made in accordance with this Judgment; and it is further

ORDERED that defendant's motion for summary judgment as it relates to attorney's fees be, and the same hereby is, denied.

Filed Nov. 21, 1974
JAMES F. DAVEY,
Clerk

Thomas A. Flannery
United States District Judge

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 75-1022

NORTHWEST AIRLINES, INC., APPELLANT

v.

AIR LINE PILOTS ASSOCIATION INTERNATIONAL

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No. 75-1095

NORTHWEST AIRLINES, INC.,

v.

AIR LINE PILOTS ASSOCIATION INTERNATIONAL, APPELLANT

———0———

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(D.C. Civil 829-73)

———0———

Argued December 16, 1975

Decided February 3, 1976

Philip A. Lacovara, with whom *David A. Ranheim*, was on the brief for appellant in No. 75-1022 and appellee in No. 75-1095.

Stephen B. Moldof, of the Bar of the Court of Appeals of New York, *pro hac vice* by special leave of court, with whom *Robert S. Savelson* and *Donald J. Capuano* were on the brief for appellant in No. 75-1095 and appellee in 75-1022. *Michael E. Abram* and *Glenn V. Whitaker*, also entered appearances for appellant in No. 75-1095 and appellee in No. 75-1022.

Before: BAZELON, *Chief Judge*, CLARK,* *Associate Justice* of the Supreme Court of the United States, and ROBINSON, *Circuit Judge*.

Opinion for the Court filed by *Chief Judge* BAZELON.

BAZELON, *C.J.*: Appellant Northwest Airlines brought this suit to set aside an arbitration award to the Air Line Pilots Association pursuant to the Railway Labor Act.[1] Although the district court concluded that the award was predicated on a dispositive mistake of fact, it granted the Association's motion for summary judgment, holding that it lacked power to review an arbitrator's findings on the

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* Sitting by designation pursuant to 28 U.S.C. § 294(a) (1970).

[1] 45 U.S.C. § 151 (1970) *et seq.*

In 1936, Congress brought air carriers under the statute, 49 Stat. 1189, as amended, 45 U.S.C. § 181 (1970) *et seq.*

Pursuant to 45 U.S.C. § 184, Northwest Airlines ("the company") and the Air Line Pilots Association ("the union") have established by agreement a System Board of Adjustment with authority to settle disputes arising out of their collective bargaining agreement. The board is composed of two members designated by the company, two members designated by the union, and one "neutral member" selected by the parties jointly, or, if they cannot agree, by the National Mediation Board. J.A. 13-21.

merits "regardless of the degree to which the arbitrator's views on the facts and the law might be open to question."[2] We reverse.

I

The facts are fully set forth in the district court's reported opinion.[3] It suffices to say that the arbitration board's opinion turns on the meaning of the term "pilot seniority list" in a 1969 letter from the company to the union. The board deemed it unnecessary to decide that issue, stating: "It is agreed that the reference to 'pilot seniority list' in the letter does not include furloughed pilots, but is limited to those pilots on the active roster."[4] This "agreement" was allegedly arrived at between the company and union representatives during the board's first executive session.[5] However, the district court found, and it is essentially undisputed, that in fact "no such agreement was made."[6]

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[2] Northwest Airlines, Inc. v. Air Line Pilots Ass'n, 385 F. Supp. 634, 639 (D.D.C. 1974).

[3] *Id.*

[4] J.A. 36.

[5] J.A. 47. *See supra,* note 1.

[6] Northwest Airlines, Inc. v. Air Line Pilots Ass'n, *supra,* note 2, 385 F.Supp. at 636, 638.

Union counsel conceded in argument before the district court, "There is no question that the stipulation was not arrived at, Your Honor." J.A. 91. At the court's suggestion, a formal stipulation was filed to the effect that the union-appointed board members "do not recall and are not aware of any stipulation made during the executive sessions." J.A. 119, 125. Moreover, the "pilot seniority list" apparently referred to was itself admitted into evidence and was the subject of testimony before the board. J.A. 25, 42-45, 131. Contrary to the alleged "agreement," it contains the names of both active and furloughed pilots.

[Continued]

II

We think that granting relief in this case would not undermine the established policy of settling labor disputes through arbitration by opening up the merits of arbitration decisions to judicial review.[7] The board's opinion does not rest on an allegedly erroneous determination of an issue of fact or law on the record before it.[8] It rests, instead, on the removal of a dispositive issue of fact from the board's jurisdiction, based on a non-existent stipulation between the parties.

Courts retain power to set aside arbitration awards "for failure of the order to conform, or confine itself, to matters within the scope of the [board's] jurisdiction."[9]

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[6] [Continued]

It has been suggested in this court, however, that simply because the union-appointed board members "do not recall" an agreement, it does not follow that none was reached. No binding agreement can exist between a party who strenuously denies it was ever made and another who is unaware of its existence.

[7] *See, e.g.,* United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

[8] *But cf.* Gunther v. San Diego & Ariz. E. Ry., 382 U.S. 257, 261 (1965); Electronics Corp. of America v. Int. Union of Electrical Workers, 492 F.2d 1255 (1st Cir. 1974); Brotherhood of R.R. Trainmen v. Central of Ga. Ry., 415 F.2d 403, 414 (5th Cir. 1969), *cert. denied,* 396 U.S. 1008 (1970); Procter & Gamble Mfg. Co. v. Independent Oil Workers, 386 F.Supp. 213, 225 (D.Md. 1975) (court may set aside arbitrator's award if "wholly baseless and completely without reason").

[9] Section 3 of the Railway Labor Act, 45 U.S.C. § 153, subd. First, (p); *id.,* (q) (1970).

While this section applies directly only to railroad boards, the union concedes the courts look to it for guidance in assessing awards

[Continued]

When an arbitration board ventures outside the scope of the authority conferred on it by the collective bargaining agreement, it lacks power to bind the parties.[10] Similar considerations mandate court intervention when an arbitration panel mistakenly assumes that certain issues are not before it. There too the board's award does not derive its force from the agreement between the parties, since the board's resolution of the controversy is fatally flawed by a misunderstanding of its assigned task.

This is not to say that courts may lightly disturb interpretations by arbitrators as to what disputes are arbitrable under the language of a contract. The arbitrator

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[9] [Continued]

by air transport boards as well. *See* 385 F.Supp. at 637; Appellee's brief at 17, 59. *See also,* Int. Ass'n of Machinists v. Central Airlines, 372 U.S. 682, 694-95 (1963); Bower v. Eastern Airlines, 214 F.2d 623 (3rd Cir.), *cert. denied,* 348 U.S. 871 (1954); Rossi v. Trans World Airlines, 350 F.Supp. 1263 (C.D.Cal. 1972), *aff'd,* 507 F.2d 404 (9th Cir. 1974); Gordon v. Eastern Airlines, 268 F.Supp. 210 (W.D.Va. 1967).

[10] . . . an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. . . . [H]is award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

United Steelworkers v. Enterprise Wheel & Car Co., *supra,* note 7, 363 U.S. at 597.

The district court was not unaware of this line of authority, but construed it narrowly as applying only to the types of remedies available. Noting that the remedy in this case was of a type "clearly contemplated by the contract and designed to further its aims," the district court concluded that therefore the arbitrators had not exceeded their jurisdiction. 385 F.Supp. at 639.

Although remedies were at issue in the *Enterprise Wheel & Car* case itself, we do not think the principle that the arbitrator's authority must derive from the agreement can be so limited. *See also* Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 374 (1974).

made no such determination here, and the policies which mandate deference to substantive decisions by arbitrators are inapplicable if a mistake of fact has led the arbitrator not to resolve the issues tendered.

We hold only that where, as here, an undisputed mistake of fact causes an arbitrable issue to be removed from arbitration, a court has both the power and the duty to refuse to enforce the award. We therefore reverse and remand to the district court with directions to set aside the award of the System Board of Adjustment and remand this matter for reopening in further proceedings consistent with this opinion.[11]

So ordered.

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[11] Arbitration proceedings by their nature as not generally amenable to the remedy of a remand. *See* Washington-Baltimore Newspaper Guild v. Washington Post Co., 143 U.S.App. D.C. 210, 442 F.2d 1234, 1238-39 (1971). There a decision had already been rendered on the record before the arbitrator. Because the parties had agreed to private arbitration, in which the subpoena power is lacking, certain evidence was not originally available. We concluded that to remand for additional evidence would be to give one side "more than the benefit of its bargain." *Id.*

In this case, however, remand is necessary if the parties are to receive what they bargained for—a board decision resolving their arguments and evidence one way or the other, as opposed to relying on a non-existent stipulation of dispositive fact.

Order of Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1975—Civil Action 829-73

No. 75-1022

NORTHWEST AIRLINES, INC.

Appellant

v.

AIR LINE PILOTS ASSOCIATION INTERNATIONAL

No. 75-1095

NORTHWEST AIRLINES, INC.,

v.

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Appellant

Before: Justice TOM CLARK*, *Associate Justice of the Supreme Court* of the United States; BAZELON, *Chief Judge;* ROBINSON, *Circuit Judge.*

ORDER

On consideration of the petition for rehearing filed by Air Line Pilots Association, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

Filed February 27, 1976

GEORGE A. FISHER
Clerk

* Sitting by designation pursuant to Title 28 U.S. Code Section 294(a).

Order of Court of Appeals Denying Suggestion for Rehearing *In Banc*

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1975—Civil Action 829-73

No. 75-1022

NORTHWEST AIRLINES, INC.,

Appellant

v.

AIR LINE PILOTS ASSOCIATION INTERNATIONAL

No. 75-1095

NORTHWEST AIRLINES, INC.,

v.

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Appellant

Before: BAZELON, *Chief Judge;* WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges.*

ORDER

The suggestion for rehearing *in banc* filed by Air Line Pilots Association having been transmitted to the full Court and no Judge having requested a vote thereon, it is

ORDERED by the Court *in banc* that the aforesaid suggestion for rehearing *in banc* is denied.

Per Curiam

For the Court:
GEORGE A. FISHER
Clerk

Filed February 27, 1976
GEORGE A. FISHER
Clerk

Statutory Provisions

Railway Labor Act, as amended, Section 3(p), 45 U.S.C. § 153(p):

> (p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the decision of the Adjustment Board: *Provided, however,* That such order may not be set aside except for failure of the division

to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

Railway Labor Act, as amended, Section 3(q), 45 U.S.C. § 153(q):

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the di-

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division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

Railway Labor Act, as amended, Section 204, 45 U.S.C. § 184:

SEC. 204. The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 3, Title I, of this Act.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of car-

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riers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this Act shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.